Council of the
INSPECTORS GENERAL
on INTEGRITY and EFFICIENCY

October 22, 2019

Honorable Steven A. Engel
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Dear Assistant Attorney General Engel:

Thank you for your interest in the views of the Inspector General community on the concerns raised by the Inspector General of the Intelligence Community (ICIG) in response to the Office of Legal Counsel's (OLC) September 3, 2019 Memorandum for the Office of the Director of National Intelligence (ODNI). That memorandum effectively overruled the determination by the ICIG regarding an "urgent concern" complaint under the Intelligence Community Whistleblower Protection Act (ICWPA) that the ICIG concluded appeared credible and therefore needed to be transmitted to Congress. This letter from the Council of the Inspectors General on Integrity and Efficiency, on behalf of the undersigned federal Inspectors General (IG), expresses our support for the position advanced by the ICIG and our concern that the OLC opinion, if not withdrawn or modified, could seriously undermine the critical role whistleblowers play in coming forward to report waste, fraud, abuse, and misconduct across the federal government. Further, as addressed in detail below, OLC's interpretation regarding the ICWPA procedure in question, which mirrors the procedure that Congress included in Section 5(d) of the Inspector General Act of 1978 (IG Act), has the potential to undermine IG independence across the federal government.

As an initial matter, we find the arguments and concerns raised by the ICIG in his September 17, 2019 response to the OLC memorandum compelling. OLC concluded that the foreign election interference alleged by the whistleblower was not an "urgent concern" within the meaning of the ICWPA because it did not concern "the funding, administration, or operation of an intelligence activity" under the authority of the DNI. In his response, by describing and citing to the DNI's relevant legal authorities, the ICIG showed that the DNI has a broad legal mandate to address intelligence matters related to national security, as well as the specific responsibility to assess instances of possible foreign interference in United States elections and identify, to the maximum extent possible, the methods used and persons and foreign governments involved in the interference. These responsibilities support the ICIG's conclusion that the protection of federal elections from foreign interference is squarely within the DNI's "operations". The legal authorities cited in his letter also support the ICIG's determination that the whistleblower raised a claim of a serious or flagrant problem that relates to an intelligence activity within the DNI's jurisdiction. It surely cannot be the case that the DNI has responsibilities related to

foreign election interference but is prohibited from reviewing the cause of any such alleged interference.[1]

We further note that the DNI has jurisdiction over the handling of classified and other sensitive information. As a result, the whistleblower's allegation that certain officials may have misused an intelligence system also raises an additional claim of a serious or flagrant problem that relates to the operations of the DNI and therefore may properly be considered an urgent concern under the statute.[2]

The OLC memorandum also confuses whether the ICIG has jurisdiction to investigate alleged foreign interference with U.S. elections with the question of whether the DNI has the responsibility to address that issue. The ICIG determined that the whistleblower complaint relates to intelligence activities subject to the DNI's responsibility and authority, and the ICIG is responsible, under the ICWPA, for making an independent judgment as to what disclosures represent an "urgent concern" related to DNI's jurisdiction. The two cases cited in the OLC opinion, which narrowly question an IG's authority to conduct specific regulatory compliance investigations on behalf of its establishment agency, are distinguishable from the ICIG's ability to accept, review, and transmit whistleblower allegations related to DNI responsibilities.[3] They do not undermine the responsibility, under the ICWPA, for the DNI to transmit to Congress what the ICIG determined to be an urgent concern related to the DNI's jurisdiction.

We also share the ICIG's concern that the OLC opinion could seriously impair whistleblowing and deter individuals in the intelligence community and throughout the government from reporting government waste, fraud, abuse, and misconduct. Whistleblowers play an essential public service in coming forward with such information, and they should never suffer reprisal or

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[1] The fact that other parts of the government, such as the Federal Bureau of Investigation and the Department of Justice, also have responsibilities in this area does not divest the DNI of such duties as a matter of law or practice. The ICWPA does not require that the activity that is the subject of an urgent concern be exclusively within the purview of the DNI, but only that it is "relating" to such operations,

[2] The suggestion in the OLC memorandum that the jurisdiction of the DNI, or any federal agency head, is limited to the conduct of their own employees is not correct as a matter of law or practice. In this example, the misuse of federal intelligence systems within the oversight of the DNI, by whomever it may allegedly have been done, would relate to the administration or operation of an intelligence operation or activity within the responsibility of the DNI and, therefore, properly be the subject of an urgent concern.

[3] Courts have routinely denied challenges raised by regulated entities to OIG jurisdiction, including challenges relying on the notion that OIGs cannot be involved in a "routine agency investigation". *See, e.g. Univ. of Med. & Dentistry of New Jersey v. Corrigan,* 347 F.3d 57, 66 (3d Cir. 2003) ("[W]e see no basis for concluding that the inspector general's authority cannot overlap with that of the department. As the Court of Appeals for the Fifth Circuit stated, "Section 9(a)(2) prohibits the transfer of 'program operating responsibilities,' and not the duplication of functions or the copying of techniques." (internal citation omitted)); *Adair v. Rose Law Firm*, 867 F. Supp. 111, 1117 (D.D.C. 1994) ("*Burlington Northern* imposed limits on the authority of Inspectors General that do not appear on the face of the statute or in its legislative history."). The OLC opinion suggests a clear delineation, when none exists, between what an OIG may not investigate (a "routine agency investigation") and what it may ("an investigation relating to abuse and mismanagement in the administration" of the programs and operations of the agencies subject to OIG oversight).

even the threat of reprisal for doing so. For over 40 years, since enactment of the Inspector General Act in 1978, the IG community has relied on whistleblowers, and the information they provide, to conduct non-partisan, independent oversight of the federal government. Because the effectiveness of our oversight work depends on the willingness of government employees, contractors, and grantees to come forward to us with their concerns about waste, fraud, abuse, and misconduct within government, those individuals must be protected from reprisal. Indeed, just three months ago, in July 2019, the Council of the Inspectors General on Integrity and Efficiency released a report that highlights the many contributions whistleblowers have made to uncovering waste and abuse in federal agencies. We agree with Senator Charles Grassley, Chairman and co-founder of the U.S. Senate's Whistleblower Caucus, who noted recently regarding this matter, that whistleblowers "ought to be heard out and protected" and "we should always work to respect whistleblowers' requests for confidentiality." Similarly, Senator Mark Warner, Vice Chairman of the Senate Select Committee on Intelligence, noted that intelligence community leaders have a responsibility to protect any "individual within the intelligence community who steps forward to lawfully report illegal or unethical behavior within the federal government."

Given the nature of the information handled within the intelligence community, Congress passed the ICWPA to ensure that employees and contractors in that community have a safe, lawful channel to disclose classified information to Congress that evidences alleged wrongdoing without fear of reprisal. As Congress has done in every other whistleblower law passed since 1978, it entrusted IGs to play a central role in the evaluation of the information provided. Specifically, the ICWPA requires an IG to make within 14 days a factual determination as to whether an alleged urgent concern provided to the IG "appears credible." If the IG determines that the allegation appears credible, which necessarily includes a determination by the IG that it involves an "urgent concern," the IG is required to forward the allegation to the head of the agency and the agency head "shall" forward it to Congress within 7 days "with any comments." The ICWPA's use of the word "shall" makes it clear that the statute does not authorize the agency head, or any other party for that matter, to review or second-guess an IG's good faith determination that a complaint meets the ICWPA's statutory language. Indeed, an earlier Senate version of the ICWPA would have authorized Intelligence Community employees to report urgent concerns directly to Congressional committees of jurisdiction. However, in response to Executive Branch constitutional concerns, Congress ultimately created the current procedure by which IGs would be entrusted with the assessment of the urgent concern and would trigger production to Congress if the IG determined that the allegation "appears credible."[4]

This ICWPA procedure, which Congress created in 1998, mirrors the procedure that Congress included in Section 5(d) of the IG Act. Under that provision, when an IG identifies "particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs

[4] The additional Executive Branch role under the ICWPA was added to protect potentially highly classified information. For example, for highly classified intelligence information or activities, notification could be restricted to the chair and ranking members of the appropriate committees and chambers of Congress.

and operations" of the agency, the IG must notify the agency head in writing of such matters. Section 5(d) requires that the agency head, within 7 days of receipt of the letter, "shall" transmit the IG's written concerns to Congress along with "any comments [the agency head] deems appropriate." It would be wholly inconsistent with the IG Act, and undermine IG independence, if the agency head – instead of forwarding the IG's concerns to Congress as the law requires – sought OLC's advice so that OLC could consider, and then potentially second-guess, the IG's determination (a) that the problem, abuse, or deficiency was a "serious" or "flagrant" one, or (b) that it related to the administration of agency programs and operations.

In this matter, OLC did not find that production to Congress was limited due to a valid constitutional concern. Rather, OLC substituted its judgment and reversed a determination the statute specifically entrusted to the ICIG because of its independence, objectivity, and expertise to credibly assess the information. In our view, the OLC's opinion undermines the independence of the ICIG and wrongly interprets the respective roles and responsibilities of IGs and agency heads under the ICWPA. Further, the opinion potentially creates space for agency heads across government to make their own determinations related to IG jurisdiction or reporting. Such a result would be contrary to IG independence and congressional intent in requiring IGs to maintain independent legal counsel and may impede the ability of Congress and taxpayers to obtain the objective and independent oversight they rely on from IGs.

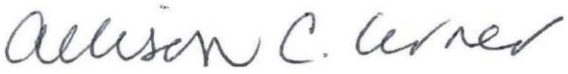
Perhaps most concerning to the IG community, we believe that the OLC opinion creates uncertainty for federal employees and contractors across government about the scope of whistleblower protections, thereby chilling whistleblower disclosures. As the ICIG noted in his letter to OLC, "because OLC's opinion determined that the DNI is not required to transmit the complaint to the intelligence committees, a question has arisen about whether the Complainant has the statutory protections against a reprisal, or threat of reprisal, for submitting the disclosure pursuant to the 'urgent concern' process." Given their importance to accountability in government, it is critical that the protection of whistleblowers from retaliation not be diminished by OLC's narrow interpretation of the ICPWA.

If intelligence community employees and contractors believe that independent IG determinations may be second guessed, effectively blocking the transmission of their concerns to Congress and raising questions about the protections afforded to them, they will lose confidence in this important reporting channel and their willingness to come forward with information will be chilled. More generally, this concern is not limited to the intelligence community but will have a chilling effect that extends to employees, contractors, and grantees in other parts of the government, who might not consider it worth the effort and potential impact on themselves to report suspected wrongdoing if they think that their efforts to disclose information will be for naught or, worse, that they risk adverse consequences for coming forward when they see something they think is wrong. That would be a grave loss for IG oversight and, as a result, for the American taxpayer.

For these reasons, we agree with the ICIG that the OLC opinion creates a chilling effect on effective oversight and is wrong as a matter of law and policy. We urge you to reconsider the conclusions of the OLC opinion and withdraw or modify it.

Sincerely,

Michael E. Horowitz
Chairperson
IG, U.S. Department of Justice



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Additional Signatories:

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